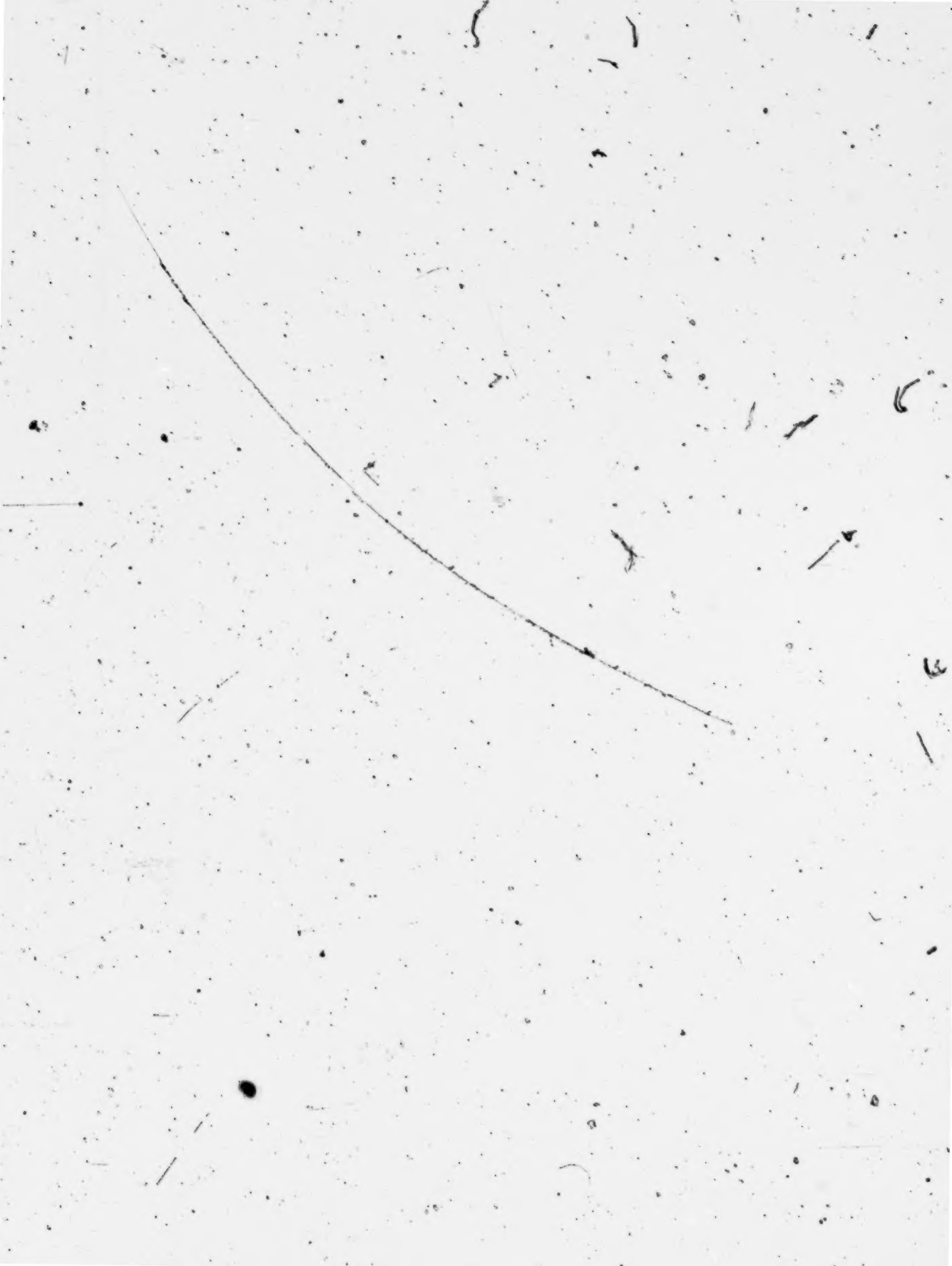

IN THE

Supreme Court of the United States

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington
REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In reply to the Brief for the Respondents Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, the Indian petitioners respectfully present for the Court's attention the following comments:

TREATY AND STATUTES INVOLVED

On pages 8 and 9 of Respondents' Brief, three separate statutes are cited with the introduction on page 8, "State laws most violated by Indians claiming off-reservation fishing rights are:. . . ." This connotes the impression that state statutes have been enacted in the State of Wash-

ington which prohibit or restrict Indian Treaty fishing rights.

Respondents have cited no statute nor do petitioners know of any whereby the legislature of the State of Washington has expressed any intention that its fisheries laws have any application whatsoever to prohibit Indian Treaty fishing rights. Petitioners submit that the court below assumed a legislative authority vested only with the legislature and the people of the State of Washington by virtue of Article II, Section 1 of its State Constitution, in applying the state's fisheries laws to prohibit the exercise of Indian Treaty fishing rights.

The legislature of the State of Washington has always recognized the privileges and immunities of Indian Treaty fishing rights from State regulation and has never expressly, impliedly, or affirmatively removed that recognition.

The state of Washington legislature in the 1915 fisheries code, Chapter 31, states its express recognition of these rights in Section 42 as follows:

> "Nothing in this act shall prevent any Indian from taking fish at any time without a license for the consumption of himself or family with a drag seine not more than three hundred feet in length or with a set-net, in any of the salt waters bordering any Indian reservation and within one-half mile thereof, or with a set-net extending not more than one-third across the waters of any river or stream flowing through or bordering on any such reservation and within five miles of the boundaries thereof. Provided, however, that this section shall not apply to the Nooksack River."

The State of Washington legislature and the people of this State by Initiative Measure No. 77 again restated this

recognition in Section 9 of Chapter 1, Laws of 1935 which provided stringent regulations as to commercial fishing in Puget Sound and waters tributary thereto, as follows:

> "The provisions of this Act do not apply to fishing by Indians under Federal regulations, or the use of any device or means by the State or National government in catching fish for propagation or scientific purposes."

The purpose of this exemption was to preserve to Indians their reserved Treaty fishing rights. *State ex rel. Campbell v. Case,* 182 Wash. 334, 47 P.2d 24 (1935).

The legislature again in 1945 affirmatively recognized the immunity of Indian Treaty fishing rights from state of Washington regulation in Section 2 of Chapter 122, Laws of 1945 as follows:

> "It shall be unlawful for any person to fish or to take for sale or profit any salmon or other food or shell fish from any of the rivers or waters of this state or over which it has concurrent jurisdictions in civil or criminal cases, unless such person is a citizen of the United States or has declared his intention to become such, and has a proper license to catch the kind of fish taken and use the method employed; *but this section shall not apply to Indians in such manner as to affect their existing fishing rights.*"

And again in Section 6, Chapter 36, Laws of 1963 (R.C.W. 37.12.060) the State of Washington legislature affirmatively recognized this immunity of Indian fishing rights reserved by Treaty in an Act in which the federal government allowed the state to assume criminal and civil jurisdiction over Indians for certain purposes as follows:

> "Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or Indian Tribe, band, or com-

munity that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner *inconsistent with any federal treaty,* agreement, or statute or any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; *or shall deprive any Indian Tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof.*"

In enacting the 1949 fisheries code (Title 75 R.C.W.) in Chapter 112 of that session, the legislature of the State of Washington again affirmatively recognized the immunity of reserved Indian Treaty fishing rights by Section 8 of that act (R.C.W. 75.08.140) by giving the director authority to require brands, tags or other devices to be attached to fish sold from private hatcheries and Indian reservations. The title to the 1949 fisheries code, Chapter 112, Laws of 1949 is a restrictive title naming in detail all phases of the fishing industry and includes a general repealer. Nowhere in the title to the act is there any notice given to the members of the legislature that reserved Indian Treaty fishing rights were to be completely subjected to state regulation. Indeed, Section 8 of that 1949 Act indicates the legislative intent that just the opposite was the case as there would be no reason to bestow upon the director the power to cause fish caught by Indians to be identified as Indian fish unless the Indians had special Treaty privileges under which their fish could be taken. The provisions of the first three sections quoted from herein were buried in the wholesale schedule of

fisheries laws repeals contained on Pages 302, 303, 304, 305 and 306 of this same 1949 Act. Petitioners submit that this conveyed no affirmative expression by the legislature that Indian fishing rights were thereafter to be completely subjected to state fishing regulations, as Section 8 of the 1949 Act conveyed the opposite impression and Section 85 carefully preserved to any person any right or protection secured to him by the Constitution of the United States. Any contention that the 1949 enactment of the fisheries code removed the recognition by the legislature of this State of the immunity of Indian Treaty fishing rights from state fisheries laws and regulations is untenable as there was no expression of such intention or notice in the title to the Act and under the decisional law of the State of Washington expressed in *Price v. Evergreen Cemetery Company*, 57 Wn.2d 352, 357 P.2d 702 (1960), the 1949 fisheries code insofar as it relates to removal of this immunity would be unconstitutional.

The administrators of the respondent departments are fully aware that there are no State of Washington statutes prohibiting the exercise of Indian Treaty fishing rights and that State conservation statutes do not apply to Indian Treaty fishing rights. Otherwise, they would knowingly have violated these same statutes in working out an agreement with the Makah Tribe to allow them to net fish at their usual and accustomed grounds on the Hoko River without State interference, which resulted in the following regulation promulgated by respondent department of fisheries: Washington Administrative Code (WAC 220-48-040).

". . .

"(8) It shall be lawful for members of the Makah

> Indian Tribe to take, fish for or possess salmon taken with gill net gear in the Hoko River from the Highway 9-A bridge to the mouth from September 15 to November 30, both dates inclusive: PROVIDED, That it shall be unlawful to fish during weekly closed periods running from 3 p.m. Sunday to 3 p.m. Friday from September 15 through October 31, and from 3 p.m. Monday to 3 p.m. Friday from November 1 through November 30. Gill nets shall have meshes not less than 6⅝ inches stretch measure.
>
> ..."

This is the same type of activity of petitioners prohibited by the court below as being in violation of state statutes or regulation of respondents promulgated pursuant thereto.

This administrative interpretation that neither the legislature nor the people of the State of Washington have ever intended to make the fisheries and gam. fish laws of the State applicable so as to restrict or abolish Indian Treaty fishing rights starkly stands out from this further salient fact.

Nowhere in the multitude of rules and regulations adopted by the administrators of the respondent departments is there even one past or current promulgation of a rule or regulation applying the State's fisheries or game fish laws to Indian Treaty fishing in any manner, unless consented to by the Indian Tribe involved. It is submitted that the reason for this is obvious. Any such regulation would be an unconstitutional assumption of legislative authority as there is no state statute making these laws so applicable. The statutory and regulatory evidence is that the administrators of the state departments involved have expressly recognized the immunity of Indian Treaty fishing rights from state fisheries laws.

STATEMENT OF THE CASE

1. On page 10 of respondents' brief it is pointed out that the State of Washington expends large sums of public monies to develop spawning acres, hatcheries, fish ladders, correction of pollution, etc. It should be pointed out that a large percentage of these funds is reimbursed back to the state from the federal government (For example, see RP Ex. 32, Page 51 of Washington State Department of Fisheries 73rd Annual Report for 1963). Petitioners suggest that in light of these federal expenditures perhaps the federal government should have a part in the determination of who should share in the fish reared with these federal funds.

2. On page 11 of respondents' brief the following statement appears:

> "Those laws and regulations completely prohibit net fisheries in all rivers and streams within the state. The Puyallup River is therefore closed to net fishing."

This statement does not appear to be accurate. Commercial netting of salmon and steelhead in and at the mouth of several rivers and streams of the State are permitted by regulations of the respondent department of fisheries. The following are examples of some of the current regulations of this department permitting such netting are:

> "*WAC* 220-36-010 SALMON FISHING AREAS. (1) Grays Harbor Fishing Area No. 1 shall include the waters of Grays Harbor and the *Chehalis River* with the following exceptions:
>
> "(a) The *Chehalis River* upstream from the Union Pacific railroad bridge.
>
> "(b) Those waters inside or southeasterly of the Bay City bridge.

"(c) Those waters within a radius of one-quarter mile of a monument set on the beach near the mouth of Chenois Creek.

"(d) Those waters easterly of a line starting at a monument located on the point of Holman Bluff near the mouth of Grass Creek and projected to a monument set on Point New.

"(e) Those waters northerly of a line starting at a monument located near the beach in front of the Giles Hogan residence, located west of the mouth of the *Humptulips* River, thence projected in a southeasterly direction to a monument set on the most southerly tip of the grass spit at the mouth of the *Humptulips* river, thence projected in an easterly direction to a monument on Chenois Bluff near the tripod indicated on U.S.C.G.S. Chart No. 6195, published July, 1949.

"(f) All other streams tributary to Grays harbor upstream from their mouths.

"(2) Grays Harbor Fishing Area No. 2 shall include those waters of Grays Harbor lying westerly of a line projected from the Point Chehalis Light at Westport 354 degrees true to Point Brown; and those waters lying easterly and northerly of a line projected from the outermost end of the north jetty to can buoy No. 5 at the entrance to Grays Harbor, thence to lighted whistle buoy No. 4 and thence easterly to the Point Chehalis Light at Westport. [Subsection 1 from Order 336 and 256; filed 3/1/60. Subsection 2 from Orders 465 and 256; filed 3/1/60. Subsection 2 amended by Order 638; filed 4/28/65.]

"*WAC 220-36-020* SEASONS AND LAWFUL GEAR—SALMON. (1) It shall be lawful to take, fish for or possess salmon taken for commercial purposes with gill nets in Grays Harbor Fishing Area No. 1 during the following season:

"6:00 p.m. July 11 to 6:00 p.m. November 30. . . ."

* * *

"*WAC 220-32-010* COLUMBIA RIVER — FISHING

AREAS. (1) 'Columbia River Fishing Area No. 1' shall include those waters of the Columbia River between its mouth and a point five miles downstream from Bonneville Dam.

"(2) 'Columbia River Fishing Area No. 1-A' shall include those waters of Columbia River Fishing Area No. 1 lying within the following lines: A line extending from the Washougal Woolen Mill oil pipeline on the Washington shore through the Washougal blinker light, thence projected to the Lady Island blinker light; and a line projected true north from the downstream end of Lady Island.

"(3) 'Columbia River Fishing Area No. 2' shall include those waters of the *Klickitat River* between the swinging bridge, approximately one and one-half miles upstream, and a monument located in section 25, township 3N, range 12E, a distance of twenty-five feet downstream from the entrance to the upper Klickitat Falls fishway (No. 5).

"(4) 'Columbia River Fishing Area No. 3' shall include those waters of the Columbia River and Grays Bay lying north of a line projected true east from Rocky Point, easterly of a line projected through Nun Buoy No. 16 from a white boundary marker at the south entrance to Deep River, as shown on U.S. C.G.S. chart No. 6151 and southerly of white boundary markers located on Grays River on a line corresponding to the southern boundary of the N.W. ¼ of the N.W. ¼ of section 33, township 10 N., range 8 W.

"(5) 'Columbia River Fishing Area N. 4' shall include those waters of the Columbia River and its Washington tributaries not included in Areas 1, 1-A, 2 and 3.

"*WAC 220-32-020* — LAWFUL AND UNLAWFUL ACTS. (1) It shall be lawful to take, fish for or possess salmon taken for commercial purposes in Areas 1, 1-A and 3 with gill nets and hand dip nets.

"(2) It shall be lawful for bona fide Indian fish-

> ermen to take, fish for or possess salmon taken for commercial purposes in Area 2 with hand dip nets. . . . ."

The respondent state department of game has long been opposed to the non-Indian commercial netting of steelhead which is permitted in the Columbia River by regulation of the respondent state department of fisheries which allows commercial netting of salmon during periods when steelhead are running up the river.

3. On page 12 of respondents' brief the following statement is made:

> "At all times anadromous fish were migrating to their spawning grounds in the Puyallup River, the petitioners have pursued their commercial fishing activities with both set nets and drift nets on a seven day per week, twenty-four hour per day basis. The fishing gear utilized by petitioners effectively blocked passage of anadromous fish ascending the Puyallup River.
>
> "Due to petitioners' intensive and unregulated fishing effort, insufficient numbers of adult spawners have reached the spawning grounds and state hatcheries to perpetuate the runs and races of anadromous fish of the Puyallup River."

The respondent departments cite no testimony or other evidentiary material as support for this statement. On the other hand testimony of respondents own employees called as their own witnesses is directly contradictory. For instance, a state game protector, George Smallwood, (employed by respondents) testified that the set nets never blocked passage because they never went more than half way across the river (A. 169) and that the diagrams introduced by respondents were distorted. Officer Wayland (also employed by respondents) testified

that drift nets are only used on outgoing tides (A. 165) and that they are taken out by tug boats, logs and debris (A. 166) so the netting is never carried on "on a seven day per week, twenty-four hour per day basis." Indeed it would appear inaccurate to say "The fishing gear of petitioners effectively blocked passage of anadromous fish ascending the Puyallup River" when respondents own witness, Dr. Lauren Donaldson who respondents classified as an eminent fishery biologist (Res. Br. 17) testified that in 1956 the sportsmen fishing up the river from the Indian fishery caught 18,500 anadromous fish while the Indians through whose net fishery the fish had to pass to ascend the river to the sport fishery caught only 1,500 (A. 164). In 1963 the sportsmen's catch was 10,888 fish as compared to 1,200 for the Indian fishery. (R. St. 585, 586.)

The trial court judge commented after the testimony of respondents' paid Indian fishery observers had been given, that he could find no evidence to the effect that the net fishery of Indian petitioners blocked or swept the river of fish (A. 105) and struck a statement of respondents' counsel to that effect which was (A. 104) almost identical to that now being offered *as a fact* to the court by that same counsel.

The statement that the "petitioners' intensive and unregulated fishing effort" is responsible for insufficient numbers of spawners reaching spawning grounds is argumentative and connotes the impression that the petitioners are solely responsible for this spawning deficiency. No testimony or other evidentiary material is cited in support of this fanciful statement. It would appear from the fact that 95% to 97% of the catch is harvested by non-Indian commerical and sports fishermen that the Indian

fishery is only about 3% to 5% responsible for this spawning deficiency (A. 28 (Plaintiff's Ex. No. 32), R. P. Ex. 32), A. 164.

The Indian fishery is only "unregulated" in the sense that it is not "regulated" by respondent departments. The commendable self-imposed Indian conservation regulations have been imposed in accordance with immemorial tribal tradition and custom which has a deep rooted religious connotation. The effectiveness of these traditional conservation rules to preserve the fish which are so essential to these people is evidenced by the fact not more than 3% to 5% of the runs are presently being taken by tribal members.

4. Respondents' inject the argument on page 17 of their brief that although the Indian petitioners' fishery is responsible for only 3% to 5% of the total harvest the geographical location of this fishery is biologically unsound because

> "The fish making up the various gene pools or races are milling in the Bay and the *lower river* at this time and any net fishery subjects these species to a repeated take on the same fish. The effect is drastically different from a net fishery in Puget Sound as the fish are passing through a geographical area and are only subjected to fishing once (A. 101, 102, 103)." (Emphasis supplied.)

Petitioners' diligent search of the record has not revealed any testimony or other evidence that the fish "mill" around in the *lower river*. Even respondents' own witness, the Assistant Director of the Department of Fisheries J. E. Lasater testified that the milling occurs in the Bay and at the "mouth" of the river where it enters the Bay. Correction of this undoubtedly inadvertent inac-

curacy is important to petitioners because if it is proven that the Indian fishery on "milling stocks" might endanger conservation of the fishery, then the Indian petitioners would be willing to submit regulations for approval by the federal government which would take into consideration the milling stock problem and if necessary operate their fishery in such a manner so as not to affect this milling stock[1].

---

1. The Indian fishery in this regard does not differ greatly from the manner in which the non-Indian commercial and sports fishermen are permitted to fish under respondents' regulations. The statement on page 17 of respondents' brief describing the commercial seine and gill netting of each run or race of Puyallup fish from the time it enters the Straits of Juan de Fuca and wanders down Puget Sound to the Puyallup River that "the fish are passing through a geographical area and are only subjected to fishing once" by this non-Indian commercial net fishery is misleading. Respondents' witness Assistant Director of the Washington State Department of Fisheries, Mr. Lasater, testified that each run (race or gene pool) of fish are subjected to the "regulated" commercial fishery over and over and over again continuously as it wanders towards the river through "poorer and better grounds" until 95% to 97% of the run has been harvested (A. 172, 173). This "geographical area" comprising the Straits of Juan de Fuca and Puget Sound is nearly 200 miles in length and several miles wide in places. Throughout its length the fish run is subjected to a gauntlet of nets of every type and description. The terminus of this commercial fishery is approximately two miles from the mouth of the Puyallup River at Brown's Point, the most northwesterly point of the Puyallup Indian Reservation on Commencement Bay. Respondents' regulations allow this commercial fishery to be exercised in Commencement Bay.

Note that the fish "milling" in Commencement Bay are subjected directly to a sports fishery permitted by respondents on "milling stocks." Although Mr. Lasater dismissed this as inconsequential due to the inefficiency of pole and line sports fishing it may be noted that hundreds and hundreds of sports fishermen are allowed to fish in the Bay and although the catch of each individual fisherman is relatively small, thousands of Puyallup River fish are taken overall by this method (A. 164, 180).

As demonstrated above, respondents' regulations allow commercial netting of fish in and at the mouth of several other rivers in the State of Washington.

Note also the "regulations" of respondents enforced by court order issued in accordance with the opinion of the court below prohibits petitioners from taking *even one fish* from any location. (A. 69).

5. On page 18 of respondents' brief the following statement is made

> "As an example, it has been recorded that a net fishery in the Fraser River, which is much larger than the Puyallup system, is capable of taking 98% of the migrating fish (A. 132)."

The statement is a paraphrase from the testimony of Dr. Hamilton, one of respondents' own witnesses. *Omitted* from this paraphrased language is the next sentence of Dr. Hamilton which states

> "Also, too, it is published in the Annual Reports of the International Salmon Commission that the fishery in U. S. waters, purse seine, reef nets, gillnets, are capable of taking almost 100 percent." (A. 132).

When respondents' paraphrased statement of this portion of Dr. Hamilton's testimony is read in context with the rest of his statement herein quoted it would seem apparent that all Dr. Hamilton testified to was that any net fishery if intensive enough no matter whether it is located out in the Ocean, in Puget Sound, or in a river is capable of taking nearly all the fish runs. Support for Dr. Hamilton's statement is found in the fact that the non-Indian "regulated" commercial fishery is so intensive that it harvests over 95% to 97% of the fish catch and would be capable of taking nearly 100% if closures were not put into effect. The intensiveness of the commercial fishery is evidenced by the immensity of the nets declared lawful by following department of fisheries regulations:

> "*WAC 220-48-030* — SALMON, LAWFUL GEAR. (1) Lawful purse seine salmon nets in Puget Sound shall not exceed one thousand eight hundred feet in length along the cork line while wet and purse seine and lead combined shall not exceed two thou-

sand two hundred feet. Neither shall contain meshes of a size less than four inches, nor shall the meshes of the seine and lead be lashed together to form one continuous piece of webbed gear. It shall be unlawful to take or fish for salmon with purse seine gear in Puget Sound which contains mesh webbing constructed of a twine size smaller than 210/30d nylon, 12 thread cotton or the equivalent diameter in any other material. It shall be lawful as part of the purse seine to have a bunt ten fathoms long and two hundred meshes deep which may contain mesh of a size not less than 3½ inches. It shall be unlawful for any purse seine vessel to carry an extra lead or portion thereof unless stowed below decks during the fishing operation, nor may an extra lead or portion thereof be carried aboard its skiff.

"(2) Lawful gill net salmon nets in Puget Sound shall not exceed one thousand eight hundred feet in length nor contain meshes of a size less than five inches. The nets shall be operated substantially in a straight line at right angles to the tide. Circle setting with a bull net or setting a gill net other than substantially in a straight line shall be unlawful.

"(3) Lawful reef net salmon nets in Puget Sound shall not exceed three hundred meshes on any side nor contain mesh of a size less than 3½ inches nor utilize more than two leads. Each of said leads shall not exceed two hundred feet in length measured from the bows of the reef net boats to the nearest end of the head buoys. The use of any false, detached or auxiliary lead shall be unlawful.

"(4) Lawful troll line salmon gear in Puget Sound shall be limited to not more than six lines."

ARGUMENT

1. The Petitioners Have a Special Right To Catch Fish Reserved To Them by Federal Treaty.

Respondents argue on pages 22-36 of their brief that the special right to continue to fish in their immemorial tribal manner reserved to the Indian petitioners by the Treaty of Medicine Creek as one of the negotiated terms for cessation of hostilities did not actually reserve to them fishing rights superior to non-Indians. This contention has been foreclosed by previous decisions of this court. (For discussion of these decisions see pages 2 through 6 of the brief of the Department of Justice entitled "Memorandum For the United States As *Amicus Curiae*").

In addition, the majority opinion of the court below (A. 39-55) relied on so heavily by respondents is adamant that this contention of respondents is without merit, stating:

> "The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state."

The *Tee Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) and *Village of Kake v. Egan*, 369 U.S. 60, 72 (1962), cases relied on by respondents are distinguished by the court below (A. 42) on the basis that no Treaty rights were involved in either case and thus they had nothing to do with the historical policy of the Congress to extinguish Indian title through negotiations and not force. See also footnote at A. 41. The title which the Indian petitioners hold to the special right to fish had been reserved to them by the terms of the Treaty of Medicine Creek which was negotiated with the United States.

This "title" is not only "Indian title" but is classified as "reservation" or "Treaty title," sometimes known as "recognized title." Cohen: *Federal Indian Law,* bottom of page 600. What the contention of respondents calls for is the abrogation of this federally "reserved or recognized title" to a right to fish reserved by a duly ratified federal Treaty. *Johnson v. McIntosh,* 21 U.S. 543 (1823), upon which respondents rely does not derogate from this as that case was not referring to "Treaty title," "reservation title" or other "recognized title of the Indians but only the origin of "Indian title" unrelated to a title derived from a duly ratified Treaty between the United States and an Indian Tribe.

The court below succintly dismissed this contention of respondents' by stating

> "Our answer[2] is that regardless of whether treaties with Indian tribes were necessary, they were deemed desirable by the United States and those entered into by it cannot be repudiated by this state or its courts."

The minutes of the Medicine Creek Treaty[3] and Executive Orders[4] express the importance of fishing to the

2. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 55, 91 L.Ed. 29, 67 S.Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view of the majority opinion as to Indian rights and title in the aboriginal lands when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land; does not suggest the abrogation of the treaties which have been ratified.

3. Heads of proposed treaties Article II provides "The right of fishing and hunting at common and accustomed places is further secured to them."

4. In the Fox Island conference August 4, 1856, Governor Stevens stated "offering you for fishing privileges one half of the waters of the river and the sound, offering to protect you in your rights and also offering to educate your children."

Indians and their exclusive right thereof. Then as now fishing was essential to the tribe. The total prohibition of their treaty fishing right has caused a great hardship upon these people causing many of them to be forced to accept public dole and some even to lose their homes and families. The further unreasonableness of the state's argument that the Indians should fish in the same manner and places as non-Indian citizens is shown by the fact that the Indians are a small minority group having very limited assets and special training. Thus they could not possibly afford to purchase the expensive commercial gear necessary to compete in commercial fishing as the state has suggested. Thus the practical effect of the state position would take from a small impoverished minority for the benefit of a commercial fishing group.

2. The State's Contention That the Reservation Is No Longer Indian Country Is Not Supported by Acts of Congress or the Decisions, and the Reservation and Fishing Rights Continue to Exist

The State contends that the intent of Congress in the enactment of 33 Stat. 565 (1904), was to remove the Puyallup Reservation from its status as "Indian Country" (Res. Br. 42). This is an attempt to stretch the stated Congressional intent far beyond its purpose. The only purpose of this Congressional enactment was to remove the ten year trust provision so as to allow immediate patents to issue.

United States v. Celestine, 215 U.S. 278 (1909), was decided subsequent to the enactment of 33 Stat. 565 (1904). At page 287, this court quoted from the opinion of *Eels v. Ross*, 64 Fed. 417 (9th Cir. 1894), with ap-

proval. With specific reference to the Puyallup Reservation, it was indicated that the allotment of the land and the acquisition of citizenship by the Indians did not terminate the reservation.

The State cites *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (D.C. Ind. 1940), as authority for the proposition that when lands are sold by Indians pursuant to Act of Congress, there are no "retained" hunting of fishing rights by virtue of the treaty (Res. Br. 44). This case is discussed on page 41 of Petitioners' opening brief. As stated therein, the provisions in the treaties involved in that case are not so definite and specific in reserving the hunting and fishing rights as are the provisions of the Medicine Creek Treaty (A. 71). Also, it is indicated on page 427 of the *Marks* decision that the Department of Interior had made the necessary federal level political decision disclaiming any further responsibility over the tribe. In addition to these distinctions previously mentioned, both Congress and the Washington State Legislature have spoken with regard to these reserved rights subsequent to the date of the *Marks* decision.

The intent of Congress to reserve Indian hunting, trapping and fishing treaty rights has been expressed on numerous occasions and an example of such expression appears in 67 Stat. 588, 18 U.S.C.A. 1162 B which provides as follows:

> "Nothing in this section shall . . . deprive any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The purpose of the General Allotment Act is discussed

in a recent book, *The Indian America's Unfinished Business,* compiled by William A. Brophy and Sophie D. Aberle, University of Oklahoma Press, 1966, Library of Congress Catalog Card Number: 66-16528. This book is the final report of the investigation of the Commission on the Rights, Liberties, and Responsibilities of the American Indian, formed pursuant to the intent of the Eighty-third Congress as set forth in House Concurrent Resolution 108. On page 19, the purpose is stated as follows:

> "The General Allotment Act was based on the theory that an Indian who possessed his own plat would automatically thereby become a farmer or livestock operator. Contact with whites and ownership of land were expected to teach him to become educated, civilized, and self-supporting — like his neighbors — thus relieving the government of further supervision and also throwing open large quantities of surplus land to non-Indians. Some allotments had been made earlier under treaties or laws, but the Act of 1887 subdivided land on a wholesale basis.
>
> "The farmers sadly misjudged the nature of the Indian. He was not familiar with private ownership or farming. Unfortunately, there was no provision for training him in agriculture or for granting him credit for livestock, feed, and implements. However, the 'Surplus' land and many of the allotments passed into the hands of the whites.
>
> "In 1934 when the process of alloting stopped, 246,569 assignments totaling nearly forty-one million acres had been made. The Meriam Survey *Report* in 1928, however, caused a slowdown of the parceling; and in 1934 the Indian Reorganization Act prohibited it altogether. This measure prolonged the trust period of allotments on reservations whose members accepted the Act, while an executive order extended the periods of other allotments.
>
> "Under the operation of the law of 1887, tribal landholdings were cut from approximately 138,000,-

> 000 acres to roughly 48,000,000 in 1934. This reduction provides one reason for the Indian's present impoverishment and shattered morale." (Footnotes omitted.)

It was never the purpose of any of the allotment acts to terminate an Indian reservation. Nor was it a purpose to acquire, terminate or affect the Indian hunting and fishing rights reserved by Treaty. It is important to recognize that by the allotment of the land, each Indian became the owner of a separate parcel and the land thus alloted was removed from tribal communal ownership. Fishing rights, however, remained and still do remain in tribal communal ownership. *United States v. Winans*, 198 U. S. 371 (1905), recognizes this distinction. It points out that the Yakima Indians held an easement to go across land that had previously been alloted and patented in order to reach their usual fishing grounds which are held in tribal communal ownership.

The *Klamath* and *Sanapaw* cases cited on page 45 of respondents' brief are clearly not in point, since they are cases arising after the Congressional enactment of termination acts.

Under the General Allotment Act of February 8, 1887, 24 Stat. 388, Section 5, provides that title in trust to allotments must be held by the United States for 25 years. In 1893 Congress passed an act, 27 Stat. 612, 633 as follows:

> "To enable the Secretary of the Interior, in his discretion, to negotiate with any Indians for the surrender of portions of their respective reservations; any agreement thus negotiated being subject to subsequent ratification by Congress, fifteen thousand dollars, or so much thereof as may be necessary."

The statute authorized the Commission to sell such portions as are not required for homes. The ten (10) year provision of said statute applies to such parcels as were sold. There has been no law that terminates the 25-year trust period. The position of the Puyallup Indian Tribe is that the reasoning of *Goudy v. Meath*, 203 U.S. 146 (1906), is inconsistent with the Medicine Creek Treaty and the General Allotment Act. Regardless of interpretation given the *Goudy* case, the fishing right being a communal right cannot be affected by allotment of land.

Between 1854 to 1929, as reflected in the records of the U.S. General Accounting Office, approximately One Million Dollars from funds of the Tribe was used for subsistence and maintenance of the Puyallup Indian Reservation.

3. The "Reasonable and Necessary" Test of the Court Below Means Total Prohibition of Indian Treaty Fishing Rights in the State of Washington

The Indian petitioners contend that there is something inconsistent with an opinion which holds that the members of the Puyallup Indian Tribe have a special Treaty right to net fish but results in their not being entitled to net even one fish in the exercise of that right.

The source of this inconsistency appears to derive from a breakdown in understanding as to what is meant by "regulation" and "reasonable and necessary" or words of similar import used in the opinion of the court below. It is submitted that most learned reasonable persons would understand these words so often used in equity to connote that a right could be exercised *partially* but not unreasonably or in complete disregard for the rights of others. The court below made no attempt to explain its use of the words "reasonable and necessary" or "regulation" used by it in reference to the admitted special fishing rights of Indian petitioners, as such explanation in the State of Washington

and the Pacific Northwest is apparently unnecessary. The trial court in compliance with the remittur from the court below immediately issued an absolute permanent injunction against any further exercise of Treaty fishing rights by petitioners in the Puyallup River Watershed and Commencement Bay (A. 69). That the respondent state departments interpret the words "reasonable and necessary" to mean absolute prohibition also is indicated by their usage of the term in their brief before this court.

On Page 53 of their brief respondents point out in conclusion that

> "The 'reasonable and necessary' standard adopted by the court below affords the Indians a special right and yet gives the fishery resource a means of being protected and preserved from destructive fishing practices."

On Page 39 of their brief respondent's answer to a supposed inquiry of petitioners and the United States government as to whether it is permissible to allow some net fishing by petitioners under this "reasonable and necessary" test is an emphatic *no*.

Petitioners submit that the basic reason why the "reasonable and necessary" test in unworkable is that it is too vague to follow and sets no standard. Without the protection of some certain standard within which the fishing rights of petitioners may be exercised, the Indian petitioners' rights in this regard will be abolished by respondents and State of Washington courts.

4. Respondent Departments Are Incapable of Impartially "Regulating" Petitioner's Fishing Rights and "Regulation" by Them Means Total Prohibition

The opinion of the court below and its interpretation by the trial court and the respondent departments is illustra-

tive of why respondents cannot be allowed to regulate the exercise of petitioners' Treaty reserved fishing rights if petitioners are to have any Treaty fishing rights whatsoever.

The reasons for this are three-fold.

(a) The commercial fishing industry in the State of Washington is a sick industry. Its illness may be diagnosed as malnutrition stemming from insufficient fish to supply a tremendous growth in the number of fishermen and the efficiency of the boats and nets used. Although the fish supply has increased in both number and size of fish, it has not nor can it in the future keep pace with the increase in number of fishermen and gear. Several schemes by way of remedy have been advanced in the State of Washington but to no avail.[5] This industry has brought pressure upon the respondent department of fisheries to supply more and more fish to satisfy an insatiable appetite. The extent of this pressure is not only evidenced by the attempt here to deprive the Indian petitioners of the few fish which represent their livelihood but by the fact the respondent department of fisheries has found it necessary to allow steelhead trout to be netted commercially in waters bordering the State of Washington despite the protests registered by the respondent department of game against the commercial netting of thousands of these game fish. In light of this pressure it would not appear respondents could possibly act as an impartial arbiter of the relative rights of the commercial and sports fishermen as against the minority group of Indians' rights to these fish.

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5. See "Salmon Gear Limitation in Northern Puget Sound Waters," a portion of which is quoted in Appendix of this reply brief.

(b) The value of the few fish taken by the petitioners does not justify the expenditure of funds by them for fisheries research or observation and petitioners have no way of questioning any claim, statistics or expert opinion advanced by respondents to justify prohibition of their fishing right.

(c) Petitioners are helpless to withstand an attack by respondents and their experts against the exercise of their Treaty reserved fishing rights. All the fish biologists, experts, statisticians, enforcement officers, and observers are either directly or indirectly employed or paid by respondent departments or their mutual employer, the State of Washington. Every witness called by respondents would be classified in any court of law as "interested" witnesses. Respondents remark on page 39 of their brief that "petitioners produced not a single witness to challenge respondents' evidence." Petitioners submit that they could not at the trial nor could they in the future produce a single "uninterested" expert witness to testify for the simple reason that there are none. All the experts belong to or are beholden to respondents in one capacity or another. Respondents will always have an abundance of expert interested witnesses to testify that the taking of even one fish by petitioners must be prohibited. Petitioners further submit that the fact all expert witnesses are in the employ of respondent departments or their mutual employer the State of Washington should not result in the abrogation of their reserved Treaty fishing right.

SUGGESTED SOLUTION

It is the position of the petitioners herein that the term "conservation" and the term "reasonable and necessary" as

used by the respondent, State of Washington herein, means totally prohibiting any type of commercial fishing by the Puyallup Indan Tribe. Obviously, for this reason the petitioners nor can other Indian tribe in the State of Washington, Oregon or Idaho permit the State to regulate. The petitioners submit the following possible solutions:

(1) Apply the "indispensable standard" as set forth in *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, (1963) printed at A. 201 through A. 209, be made applicable to the instant case. The "indispensable" test would give assurance to petitioners that respondents would regulate the commercial and sports fisheries so that enough fish would be permitted to escape their nets and enter the Puyallp River to allow the petitioners the right to catch adequate fish so necessary for their existence and way of life without endangering "brood stock." This has not worked in the past because the State of Washington has refused to be bound by the "indispensable" test as set forth by the 9th Circuit.

(2) The Court adopt the ruling of the majority Court in *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957).

CONCLUSION

In conclusion the petitioners request that the court give full force and effect to the intent of the Medicine Creek Treaty reserving to the Puyallup Indians their treaty fishing rights free from the State's regulation which have prohibited their Indian fisheries.

Respectfully submitted,

ARTHUR KNODEL
Attorney for Petitioners

APPENDIX A

Salmon Gear Limitation in Northern Washington Waters

University of Washington Publication in Fisheries

ABSTRACT

The excess fishing gear used to harvest the salmon resource of northern Puget Sound and the Strait of Juan de Fuca has endangered the conservation of the salmon runs and greatly reduced the earnings of the men and vessels engaged. The International Pacific Salmon Fisheries Commission has officially requested that the gear be reduced, but it lacks the power to require its reduction.

This study is the result of a request by the Governor's Fishery Advisory Committee and the Legislative Interim Committee on Fisheries to the University of Washington. The study has been organized in three main parts: (a) Biostatistical analyses of the catches to determine the amount by which the gear can be reduced and the runs still harvested; (b) Economic studies to determine the recent earnings of men and vessels and to estimate the effect on earnings of a reduction in gear; and (c) Legal studies to determine whether a legislatively-prescribed scheme for restricting the number of units of gear fishing would be valid.

The findings are:

1. The number of units of fishing gear can be reduced to two-thirds the recent amount, and all runs can be fully harvested. The number might be reduced to as little as one-half the recent amount with no effect on the full harvest of any except very large runs.

2. The recent earnings of all three major types of gear are severely depressed despite record or near-record runs of the most valuable species, the sockeye.

3. If the number of units of fishing gear were reduced to two-thirds the recent number, the additional income to boat owners and fishermen would range from $700,000 to $2,500,000 annually, depending on the size and composition of the run.

4. Any further increase in the numbers of units fishing or decrease in the size of the runs will cause more severe economic loss.

5. Conservation regulations can be more precise with fewer units of fishing gear and the runs will be subject to less risk of overfishing.

6. Broadly speaking, if legislation to limit the number of fishermen is enacted, it would seem likely to withstand challenge based on the constitutional concepts of due process and equal protection, for the following basic requirements would be met; The legislature has proceeded upon some basis in fact; it has made a rational determination that some benefit to the general welfare of the people would be served by the legislation; and, further, it has made a rational choice of means to accomplish that benefit. Such legislation should not, nor is it contemplated that it would, discriminate against nonresidents of the state. As to specific provisions of such legislation, the conclusion is drawn that a grandfather clause would be valid, but other details have been examined cursorily or not at all, since the detail of proposed legislation has not been determined.

Recommendations are made for specific steps to reduce the number of units of fishing gear.

I. Introduction

Many people around the world who have studied trends in fish populations and who have been concerned with fisheries conservation have become alarmed at man's tendency to destroy the fish stocks. Every stock can produce a maximum sustained yield, but when this is temporarily exceeded, the future generations of fish and men must suffer. As the men fish harder and harder, the fish stock can produce less and less because we have no way of augmenting the stock, but must harvest merely what God has provided.

Michael Graham, who was long the director of the principal fisheries laboratory in Great Britain, stated his "Great Law of Fishing."* He stated this simply as "fish-

*Graham, Michael, 1949, *The Fish Gate*, Taber and Faber, Limited. London. 199 pp. Chapter 13.

eries that are unlimited become unprofitable" and he stated further that as the fishing effort increases the fisheries stay unprofitable and the fish stocks tend to die out. A series of studies by professional economists in recent years reinforces this conclusion. Fisheries with free entry invariably produce low incomes and poor efficiency, and there is no automatic tendency to correct these undesirable results.

This problem of excess fishing effort has plagued fishermen and those concerned with the conservation of fish in Washington for many years. It has recently become a much more urgent problem as people realized that they had had years of near-record salmon production that were yielding little if any profit to the salmon fishermen. The runs of sockeye salmon have been increased to near-record sizes, yet there has been no increase in benefits to the fishermen, the processors, or the public.

The International Pacific Salmon Fisheries Commission has long been concerned with the problem of excess fishing effort, and on December 18, 1957, its chairman sent the following letter:

December 18, 1957

Mr. W. C. Herrington
Special Assistant the Under Secretary
Department of State
Washington 25, D.C.

Dear Mr. Harrington:

The International Pacific Salmon Fisheries Commission has reported to the United States Government on several occasions that the recent rapid increase in the gear efficiency and units of fishing gear in United States Convention waters has created a situation which make the fulfillment of our terms of reference extremely difficult.

Since 1951 the development of nylon gill nets has increased the efficiency of this gear by an estimated 50 per cent resulting in a rapid growth of the gill net fleet. In 1957, 637 gill nets fished sockeye as compared with 322 gill nets the preceding brood year cycle and only 46 in 1945 the third preceding cycle. The 1956 gill net fleet comprised 491 boats compared with 192 the previous brood year cycle and 55 boats in the third preceding

brood year cycle in 1944. The other two year cycles of sockeye runs in 1955 and 1954 show similar growth in gill net fishing activity.

The number of purse seine boats have not shown such a phenomenal increase but there has been a gradual increase of roughly 50 per cent in fleet size over the last twelve years. In addition to the increase in fleet size the drum seiner and the power block have been developed and perfected since 1950. The drum seiner is able to make twice the number of sets per day as made by the original conventional seiner. The power block has increased the number of sets made by making fishing easier and in general has increased the efficiency of this type of operation by an estimated 18 per cent or more.

Under the Sockeye Fisheries Convention the only action the Commission can take to offset the effects of the rapid increase in fishing efficiency and fleet size is to reduce fishing time. Our action in this regard has now become so stringent and the weekly closed period so long that we are unable to analyze the runs of sockeye in such a manner that proper racial escapement and equal division of the catch as required between the fishermen of the United States and Canada can be guaranteed. The fishing industry is likewise faced with uneconomic operations arising out of the allowable short fishing weeks.

Article V of the Sockeye Fisheries Convention prescribes in part as follows: "Whenever, . . . the taking of sockeye salmon in waters of the United States of America . . . is not prohibited under an order adopted by the Commission, any fishing gear or appliance authorized by the State of Washington may be used in the United States of America by any person thereunto authorized by the State of Washington . . . ," The Commission is in complete accord with this provision but in view of our serious difficulties brought about by the rapid increase in fishing fleet size and gear efficiency we ask that the United States Government transmit a statement of our current problem to the State of Washington; further that we believe it desirable in the interest of good management that a regulatory formula be designed by and satisfactory to the State of Washington which will reduce fishing efficiency in the

United States Convention waters by a minimum of 25 per cent effective if possible prior to the 1959 fishing season.

In making this recommendation the Commission recognizes that a similar problem exists in other major fishing areas of the Pacific Coast of North America and that attempts to control fleet size and gear efficiency have not been entirely successful to date. We do, however, believe that the State of Washington will, upon receipt of our recommendations, take such action as it deems most desirable in an attempt to correct a very serious and difficult situation.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ T. Reid

Senator Thomas Reid
Chairman

The problem was also stated forcefully by Mr. DeWitt Gilbert, a more recent chairman of the Salmon Commission, at the Commission's meeting in Bellingham on December 19, 1961, and I quote:

Now let's consider some of our problems. One of them is high-lighted by the fact that the industry generally considers 1961 a disastrous season, despite the fact that it yielded the third largest pack made on this cycle since 1917.

What is wrong when third-best in 11 cycle years is a "disaster"?

Why do many purse seiners of both fleets report they failed to make expenses? Why do all types of gear fishing around Point Roberts report consistently declining returns? Why do Fraser River gillnetters say they are catching fewer fish than formerly?

The answer, plainly, lies in over-development of the fishery.

For years the Commission has reported to the two Governments, and to the industry, that increasing gear efficiency, increasing fishing effort and expanded fishing areas are making it most difficult for the Commission to fulfill its management responsibilities.

This over-development is not alone a matter of *numbers* of boats and nets, although that is important.

Other factors concern area of operations and efficiency of gear. Within the past 10 years the Canadian side of Juan de Fuca Strait has become a major fishing area. . . . The Power Block has doubled or tripled the number of sets a seiner can make in a day. . . . Drum seine gear permits a boat to make as many as 15 sets a day. . . . Synthetic fiber gill nets are universally used, and they have about twice the fish-catching ability of linen nets. . . . Mobility of the fleet, increasing with speed and power, permits high-speed craft to shift between areas, defeating efforts at effective administration.

Further, the fishermen get smarter, about the ways of the fish, and the methods of fishing.

To secure an escapement in the face of the increased intensity and efficiency of fishing effort, the Commission has been forced to reduce fishing time. Even with the drastic measures applied on the Early Stuart run in 1961, when the Strait was closed completely and the other major areas averaged less than three days per week, the actual escapement was less than 20 per cent of the run.

If the fishery had operated in the Strait, and the other areas had been on a two-day-a-week basis, it is doubtful if we could have secured the minimum 20 per cent escapement.

Essentially, the Commission is not concerned with the type of gear which may be operated in Convention waters. That primarily is a governmental responsibility.

However, we do have the responsibility of regulating the operation of that gear in order that (1) the sockeye and pink salmon resource of the Fraser River may be conserved and increased; and (2) that the allowable surplus above the needs of such conservation and growth be

divided equally between the fishermen of the two nations.

So we are seriously concerned with the problem of increased development of the fishery when:

1. Fishing time must be reduced to the point where it is almost impossible for the staff to measure the timing and abundance of the runs.
2. Gear is so abundant and efficient that each fishery in several different areas spread over 200 marine miles is taking virtually *all* of the fish in any area while the gear is being operated.
3. Large sections of the fleet become resentful of necessary increase in restrictions because of declining individual boat earnings, in spite of favorable total catches.
4. Gear competition and reduced earnings per boat threaten eliminations of certain forms of gear to the point where division of allowable catch between the national fleets might not be possible.

TABLE 1. RELATIVE GEAR EFFICIENCY TABLE
(IN NUMBERS OF GILL NET UNITS)

Area	*Gear*	*Sockeye*	*Pink*	*Silver*	*Chum*
1	Purse seines	8.0	13.0	4.0	4.0
2	Purse seines	8.0	9.0	2.0	3.8
	Reef nets	2.5	2.0	1.0	1.2
3	Purse seines	5.0	11.0	3.5	3.8
4	Purse seines	....	12.8	2.0	2.5

Gill net efficiency equals 1.0 in all cases.

Data have been rounded for uniformity in the table. Most efficiencies rounded exactly to units do not have accuracy to tenths.